

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Advanced Methods to Target and Eliminate)	CG Docket No. 17-59
Unlawful Robocalls)	

**COMMENTS OF TATANGO, INC.,
ADVA MOBILE, INC., BLUE HEART IMPORTS,
EDEALCOLORADO, AND MOBINITI
IN RESPONSE TO THE SECOND FURTHER
NOTICE OF PROPOSED RULEMAKING**

THE TCPA DEFENSE FORCE
by Innovista Law
G. David Carter
John C. Nelson, Jr.
1825 K Street, NW
Suite 508
Washington, DC 20006
(202) 869-1502
(202) 869-1503 (fax)
david.carter@innovistalaw.com
john.nelson@innovistalaw.com
www.tcpadefenseforce.com

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SUMMARY

Tatango, Inc. provides easy-to-use, opt-in only, text message marketing software and industry expertise to its clients, which include some of the most well-known brands in the world. Adva Mobile, Inc., Blue Heart Imports, eDealColorado, and Mobiniti, the other SMS Industry Participants named herein, use text messaging to engage customers and facilitate opt-in only text messaging services on behalf of other companies. The SMS Industry Participants share the Commission's goal of curbing unwanted text messages and applaud the Commission for considering actions to address the challenges arising from its interpretation of the TCPA and the D.C. Circuit's decision in *ACA International v. Federal Communications Commission*.

To the extent the Commission does not reinterpret the term "called party" to mean "the person the caller expected to reach," which presents one potential response to *ACA International*, the SMS Industry Participants encourage the Commission to adopt rules that will allow them to avoid sending text messages to reassigned telephone numbers by requiring the reporting of disconnected numbers provided by wireless and VoIP service providers to one or more accredited databases. Currently, many carriers do not provide any reporting for disconnected wireless phone numbers. For those that do, they often comingle the disconnected phone numbers with suspended, unsuspended, and ported numbers. The result is an incomplete and difficult-to-assemble patchwork of information that frustrates the Commission's goal of ensuring that customers using reassigned telephone numbers do not receive unwanted calls or text messages.

Many companies have already invested significant effort to aggregate and report on disconnected phone numbers. For this reason, and because of the innovation that will occur, the Commission should propose and adopt rules that encourage continued competition. Therefore, the SMS Industry Participants encourage the Commission to create a process for accrediting

number database providers in lieu of creating a single monopoly provider, and to also implement a safe harbor provision protecting companies that scrub their robocalling and text message contact lists using data provided by an FCC-accredited source

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Tatango, Inc. (“Tatango”), Adva Mobile, Inc. (“Adva Mobile”), Blue Heart Imports, eDealColorado, and Mobiniti (jointly the “SMS Industry Participants”) respectfully submit these comments in response to the Second Further Notice of Proposed Rulemaking (“SFNPRM”)¹ released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding, which seeks input regarding potential solutions to address robocalls made to telephone numbers that have been reassigned to a new user.

I. INTRODUCTION

Tatango was founded in 2007 with the simple goal of providing easy-to-use, opt-in only, text message marketing software and industry expertise to its clients. Tatango now powers Short Message Service (“SMS”) and Multimedia Messaging Service (“MMS”) marketing campaigns for some of the most well-known brands in the world. Tatango shares the Commission’s goal of curbing unwanted text messages. Towards this end, in 2016, Tatango launched the U.S. Short Code Directory (www.usshortcodedirectory.com), which empowers consumers to identify the owners of over 8,000 short codes used by brands and organizations across the nation, allowing

¹ *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, FCC 17-90, CG Docket No. 17-59 (Mar. 23, 2018) (“SFNPRM”).

consumers to be more informed about who is communicating with them, and with instructions on how to unsubscribe from these messages.

The other SMS Industry Participants either use text messaging to engage customers or are service providers that facilitate opt-in only text messaging services.

The SMS Industry Participants welcome the Commission's interest in finding practical solutions to address the reassigned numbers issue, especially in light of the D.C. Circuit's decision in *ACA International v. Federal Communications Commission*,² which recognized the serious flaws in the Commission's 2015 Declaratory Ruling and Order and vacated the Commission's decision to impose liability for contacting a reassigned number without the new user's consent after only one call.³ Indeed, the D.C. Circuit's decision in *ACA International* was a step in the right direction, and the SMS Industry Participants are pleased to see that the Commission has welcomed the D.C. Circuit's decision as an invitation to address the flawed reasoning in the 2015 TCPA Order.⁴ But the confusion caused by the 2015 TCPA Order still remains and has actually muddled further since the *ACA International* decision was released, as law-abiding businesses across the country, like those served by Tatango, have been left with *no safe harbor protection*⁵ and still "lack guaranteed methods to discover all reassignments immediately after they occur."⁶ Consequently, these businesses have been placed in an impossible position, namely, to ensure that text messages are never made to a reassigned wireless telephone number, even though no existing mechanism captures 100 percent of the estimated 35

² 885 F.3d 687 (D.C. Cir. 2018).

³ *Id.* at 706-09.

⁴ *See, e.g.*, Chairman Pai Statement on D.C. Circuit Decision Curbing Regulatory Overreach (Mar. 16, 2018); Statement of Commissioner Michael O'Rielly on D.C. Circuit TCPA Decision (Mar. 16, 2018).

⁵ In setting aside the FCC's one-call safe harbor as arbitrary and capricious, the D.C. Circuit completely eliminated the safe harbor all together. *See ACA Int'l*, 885 F.3d at 707-08. Thus, until the Commission issues new rules, no safe harbor exists for calls to reassigned numbers.

⁶ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶ 85 (July 10, 2015) ("2015 TCPA Order").

million number reassignments occurring each year.⁷ The results of this murkiness are seen in the continued rise in TCPA litigation that is flooding our court systems.⁸ The SMS Industry Participants urge the Commission to move swiftly to propose and adopt rules to address this problem.

As a platform provider, Tatango is highly interested in helping its customers avoid professional TCPA plaintiffs who have utilized the “reassigned number” loophole to generate TCPA claims. For this reason, Tatango last year completed an exhaustive examination of ways in which it could obtain the data necessary to help its customers avoid sending text messages to reassigned wireless telephone numbers. Tatango’s examination revealed that many of the nation’s largest wireless carriers are currently providing their own reports with information regarding disconnected, suspended, unsuspended, and ported wireless telephone numbers. However, it is generally not easy to process this information because there is no uniform standard used by all wireless carriers for these reports and because many wireless carriers combine both disconnected and ported wireless telephone numbers into the same reports without identifying whether the number is disconnected or ported. The SMS Industry Participants also have concerns regarding the accuracy of the disconnect data found in the reports from the wireless carriers. Tatango’s analysis suggests that approximately 36.67 percent of the nation’s wireless carriers, usually smaller carriers, provide *no reporting at all* on telephone number disconnects or reassignments in their networks. The lack of uniformity, accuracy, and accessibility of the data from certain wireless carriers creates a patchwork of information that has

⁷ See *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, FCC 17-90, CG Docket No. 17-59, ¶ 5 (July 13, 2017) (“NOI”).

⁸ According to an analysis by WebRecon, TCPA cases are the second-most-filed type of litigation in federal court, with over 4,300 TCPA cases filed in 2017. See <https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/>.

to be stitched together, meaning that many software platform providers are not necessarily obtaining complete data or interpreting it correctly.

Based on Tatango’s analysis, the SMS Industry Participants conclude that the Commission’s 2015 observation that “callers lack guaranteed methods to discover all reassignments immediately after they occur”⁹ remains equally true today. The current reality is unsustainable. Consumers continue to receive unwanted robocalls, and platform providers, like Tatango, and their clients, the SMS Industry Participants, are subject to an amplified and unnecessary risk of being the subject of TCPA litigation, *even though no level of diligence would enable these companies to avoid text messaging every reassigned number*. Commission action to close the reassigned number loophole, either by modifying the definition of “called party” or by creating a reassigned numbers database and corresponding safe harbor, is necessary to provide businesses and consumers with the clarity that they deserve. Therefore, the SMS Industry Participants provide the following comments:

II. APPROACHES TO DATABASE ALTERNATIVES

In the SFNPRM, the Commission proposes a series of alternative mechanisms that could be used for collecting number reassignments, including (1) requiring service providers to report reassigned number information to a single, FCC-designated database; (2) requiring service providers to report such information to one or more commercial aggregators; or (3) allowing service providers to report such information to commercial data aggregators on a voluntary basis.¹⁰ It is the SMS Industry Participants’ position that the first and third proposal should not be considered, and that any rules that are proposed should retain the role of commercial aggregators and require mandatory reporting by all wireless and VoIP service providers.

⁹ 2015 TCPA Order, ¶ 85.

¹⁰ See SFNPRM, ¶ 32.

A. The Commission Should Propose Rules that Retain the Role of Aggregators

In light of the existing efforts already made to address the issue of telephone number reassignments, and to the extent the Commission does not decide to reinterpret the term “called party” to mean “the person the caller expected to reach,”¹¹ the SMS Industry Participants urge the Commission to propose and adopt rules that allow Commission-accredited aggregators to access reports from wireless carriers and make the aggregated data available to callers, like the SMS Industry Participants, and platform providers, such as Tatango. This approach will allow data aggregators to (1) benefit from the significant investment already made towards creating comprehensive disconnect databases, (2) avoid creating a monopoly service provider, and (3) help promote continued innovation.

In order to ensure that any and all aggregators properly report and record reassigned number information, the Commission should consider creating an accreditation process for aggregators. The Commission has done something similar in the context of approved testing laboratories that are empowered to certify that manufactured devices meet the Commission’s RF emission standards, and that process has allowed multiple companies to compete for business while still maintaining precision. Tatango submits that a similar market-based approach will promote innovation and ensure that appropriate incentives remain in place to keep costs for obtaining telephone number disconnect data in check.

Furthermore, all wireless and VoIP service providers should be required to report reassigned number data to aggregators.¹² As the Commission itself notes, there are a number of

¹¹ See *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, DA 18-493, CG Docket Nos. 18-152, 02-278, at 3-4 (May 14, 2018). In the event the Commission decides to reinterpret the term “called party” as “the person the caller expected to reach,” the SMS Industry Participants believe that the creation of a reassigned number database would likely be unnecessary.

¹² See *infra* Section III.C.

private reassigned number databases that are already operational, but the services provided by these aggregators are not considered sufficiently reliable because their datasets are not complete.¹³ Indeed, without mandatory reporting, the Commission's action here would simply maintain the *status quo*. Mandatory reporting, then, is the bridge between the database solution and fewer calls and texts to reassigned phone numbers. The Commission must include it in the rules it adopts.

B. The Other Alternatives Are Inferior

The SMS Industry Participants discourage the Commission from creating a single, FCC-designated database. Creating a monopoly provider for handling local number portability was necessary and appropriate for telecommunications networks to be operable and to properly route a call once a number is ported to a new carrier. But no similar issue is present here, as edge users that initiate text messages merely need to know whether to remove a consumer from their contact lists. Because of this major contextual difference, the SMS Industry Participants are unable to envision a compelling reason for the Commission to create a government-sanctioned monopoly. Rather, consistent with a pro-competitive telecommunications market, the Commission should allow companies that have already been working hard to create solutions to compete in the provision of aggregated data services to businesses, robocallers, and platform providers across the country.

The Commission's third option (the voluntary reporting proposal) is also not preferable, as it is unlikely to yield the desired result of ensuring that callers have the tools available to avoid sending text messages to reassigned numbers. This piecemeal approach is far more likely to

¹³ See 2015 TCPA Order, ¶¶ 71-72.

result in callers not obtaining full and comprehensive lists of disconnected numbers, thereby continuing to subject them to the same liabilities they must worry about today.

FCC-accredited aggregators would remove today's ever-present TCPA liability and would ensure the provision of a comprehensive solution that meets the Commission's goal of resolving the reassigned numbers issue once and for all.

III. DATABASE INFORMATION, ACCESS, AND USE

A. Information Needed by Callers & Generated by Database

The Commission is correct in its belief that, in searching a database, a caller would have available the consumer's name, telephone number, and last date of contact.¹⁴ However, the SMS Industry Participants do not believe that all of this information would necessarily need to be inputted to search the database or generated by the database once a query has been made.

The SMS Industry Participants are of the opinion that an easy-to-use, simplistic database will be the best option for aggregators and callers and that any database created should honor a consumer's privacy. Thus, they believe that callers should only need to input a consumer's phone number in querying the database and that the database should only generate back the consumer's phone number and the date on which the consumer's number was disconnected. Generating any further information, such as the consumer's name or the name of the individual whom the number was reassigned to, raises dangerous privacy issues and would do nothing but create a more unwieldy, confusing database for aggregators and callers alike.

¹⁴ See SFNPRM, ¶ 12 ("We expect that [a] caller would possess, at a minimum, the following information: (1) the name of the consumer the caller wants to reach; (2) a telephone number associated with that consumer; and (3) a date on which the caller could be confident that the consumer was still associated with that number (*e.g.*, the last date the caller made contact with the consumer at that number; the date the consumer last provided that number to the caller; or the date the caller obtained consent to call the consumer).").

B. Timing of Information Reporting

As Tatango noted in its comments in response to the Commission's *Second Notice of Inquiry*, many, but not all, wireless carriers currently provide reports regarding wireless number deactivations.¹⁵ However, some of those reports intermingle data regarding numbers that have been suspended, unsuspended, or ported to another wireless carrier. Reports of this nature make it more challenging for Tatango and the other SMS Industry Participants to differentiate between a situation in which a number that has been disconnected (and therefore should be unsubscribed from the marketing campaign), and a situation in which a number has been ported to a new wireless carrier but is still controlled by an individual that has given consent (in which case the consumer's prior consent remains valid). Based on their experience, the SMS Industry Participants recommend that the Commission propose and adopt rules that require reporting by all U.S. wireless carriers when telephone numbers have been disconnected and classified as aging. The SMS Industry Participants also encourage the Commission to impose rules requiring wireless carriers to report disconnected numbers independently of any numbers that are suspended, unsuspended, or ported to a new wireless carrier. Differentiated reporting of this nature will ensure accurate data, thus maintaining consumers that have merely ported their number to a new wireless carrier.

The SMS Industry Participants do not believe that it will be more efficient, or result in a better consumer experience, for wireless carriers to delay reporting until a number has been classified as available for reassignment or is reassigned to a new user. Indeed, the SMS Industry Participants understand that some of the largest wireless carriers are reassigning disconnected numbers to new users in as few as two days. Thus, given the speed of reassignments, it is not

¹⁵ See Comments of Tatango, Inc. in Response to the Second Notice of Inquiry, CG Docket No. 17-59, at 4 (Aug. 28, 2017) ("Tatango Comments").

practical to delay reporting significantly past the point of disconnecting a telephone number. As the Commission itself noted in the SFNPRM, any delay will increase the likelihood that a consumer assigned a recycled telephone number will receive unwanted text messages intended for the number's prior user, at least for a limited period of time while the reassignment is being reported by the wireless carrier and a caller's lists are being updated to reflect the reassignment.¹⁶ In other words, if reporting occurs at the time a telephone number is made available or reassigned, it is unlikely to provide sufficient time for a service provider to obtain the wireless carrier's report *and* unsubscribe that telephone number from marketing campaigns before unwanted text messages are sent.¹⁷ Reporting disconnects, therefore, is more appropriately tailored to accomplishing the goal that consumers avoid receiving, and businesses avoid sending, unwanted text messages.

The SMS Industry Participants do not, however, believe that it is desirable or necessary for a number that is temporarily disconnected—but that can be reactivated by the same user in the future—to be designated by the wireless carriers as disconnected. As multiple commenters have noted, by reporting a temporary disconnect as a disconnect, consumers will be unsubscribed from all previously opted into marketing campaigns, thereby requiring them to complete the opt-in process again after their telephone number is reconnected.¹⁸ Such a result would impose

¹⁶ See SFNPRM, ¶ 15 (“Because disconnection is a first step in the reassignment process, we believe that a database containing information on when a number has been disconnected will best allow callers to identify, at the earliest possible point, when a subscriber can no longer be reached at that number. With timely access to such data, callers will be best positioned to rid their calling lists of reassigned numbers before calling them.”) (footnotes omitted).

¹⁷ See Comments of Comcast Corporation, CG Docket No. 17-59, at 18 (Aug. 28, 2017) (“Comcast Comments”) (“[T]racking *only* reassignments would provide little to no lead time for callers to update their dialing lists to avoid calling consumers with newly reassigned numbers, and thus could force callers to incur additional costs.”).

¹⁸ See Comments by National Consumer Law Center on Behalf of Its Low-Income Clients, CG Docket No. 17-59, at 8-9 (Aug. 28, 2017); Comments of the Retail Industry Leaders Association, CG Docket No. 17-59, at 11-12 (Aug. 28, 2017); Response of the National Council of Higher Education Resources to the Second Notice of Inquiry on Reassigned Numbers, CG Docket No. 17-59, at 4 (Aug. 28, 2017); Comcast Comments at 16-17; Tatango Comments at 5.

undue burdens on consumers and would be inconsistent with their reasonable expectation of receiving their desired content once service is restored.

In sum, the SMS Industry Participants believe that reporting at the time the number is permanently disconnected is the most effective stage to notify businesses and service providers that a number is no longer associated with the individual that provided consent and that, as a result, no further automated text messages should be made to that telephone number. This reporting methodology is most reasonably tailored to avoid text messages to reassigned numbers.

C. Comprehensiveness of Database Information – Providers to be Covered

Tatango's platform is not intended to initiate text messages to wireline telephone numbers and the other SMS Industry Participants only market and text wireless telephone numbers. As such, the SMS Industry Participants do not take a position on whether the reassignment reporting requirements should extend to wireline carriers.

Like other platforms, Tatango's platform is capable of initiating SMS and MMS messages to a limited amount of VoIP service providers and, thus, there is a chance that the other SMS Industry Participants will text a consumer who is subscribed to a VoIP service provider. The enhanced abilities of some VoIP platforms, including the ability to forward messages to a wireless number, and the fact that certain VoIP services obtain telephone numbering resources indirectly, creates a unique challenge. Because VoIP services are not a "one-size-fits-all" situation, it is more challenging to control what may happen when a text message is sent to a number associated with a VoIP service.

While the Commission has previously suggested that "the TCPA provides greater and unique protections to wireless consumers,"¹⁹ the SMS Industry Participants respectfully submit

¹⁹ See NOI, ¶ 12.

that this shorthand description masks a more complex and important reality. The heightened consent requirement (*i.e.*, prior express consent) applicable to “wireless” numbers actually applies to calls or texts to any “paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, **or any service for which the called party is charged for the call.**”²⁰ In Tatango’s comments in response to the Commission’s *Second Notice of Inquiry*, it provided the Commission with a summary of cases revealing that “VoIP services” may be—but are not always—subject to the heightened consent requirements because the called party incurs a charge for the call.²¹ And, as shown below, there are more recently decided cases that support that position. It makes sense, then, that unless and until the Commission clarifies the TCPA’s treatment of VoIP services in a more definitive manner, businesses and platform providers may feel compelled to treat VoIP services as though they are subject to the heightened consent requirements. Thus, if the Commission wants to fully address the problems created by the reassigned numbers issue, reporting VoIP number disconnects is also a necessity.

Again, Tatango has already provided a survey of the cases where VoIP services were subjected to the TCPA’s heightened consent requirements, and more recently decided cases help to further support the SMS Industry Participants’ position:

- Just last September, the United States District Court for the Western District of Wisconsin granted a plaintiff summary judgment against a party that used an ATDS to make calls to a phone number assigned to a VoIP service.²² While the court noted that “[t]he Seventh Circuit has not decided whether [the] call-charged provision

²⁰ 47 U.S.C. § 227(b)(1)(A)(iii); *see also* 47 C.F.R. § 64.1200(a)(1)(iii).

²¹ *See* Tatango Comments at 7-8.

²² *See Baemmert v. Credit One Bank, N.A.*, 271 F. Supp. 3d 1043 (W.D. Wis. 2017).

- applies to VoIP apps,” it found that “several courts outside of the Seventh Circuit have weighed in, concluding that the call-charged provision applies to VoIP apps.”²³ Thus, the court held that summary judgment was appropriate because there was “no dispute” that the defendant had called the plaintiff’s phone number without his prior express consent and that the plaintiff was charged for the calls because some of his available VoIP credits (which he purchase from his VoIP provider and also obtained via watching advertisements) were lost because of the calls.²⁴
- In November 2017, the United States District Court for the District of Massachusetts granted summary judgment in the defendant’s favor in a putative TCPA class action case involving ATDS calls to VoIP customers.²⁵ But even though the court ruled in favor of the caller, it only did so because of the specific facts of the case. Indeed, the court acknowledged that TCPA liability can still be imposed for calls to a VoIP service: “[I]f any claim for a violation of Section 227(b)(1)(A) arising from phone calls to a VoIP telephone service exists, the plaintiff must show either that the defendant was aware that the VoIP telephone service connected to a cellular phone or that she was charged pro rata for the relevant calls.”²⁶

Thus, while not all of the cases cited now and in Tatango’s previous comments represent published, binding opinions, they do reveal that courts may, under 47 U.S.C. § 227(b)(1)(A)(iii) and 47 C.F.R. § 64.1200(a)(1)(iii), treat VoIP services in a manner identical to wireless services. Therefore, if a consumer establishes that she incurred a charge for incoming calls made to her

²³ *Id.*

²⁴ *Id.*

²⁵ *See Breda v. Cellco Partnership*, No. 16-11512-DJC, 2017 WL 5586661 (D. Mass. Nov. 17, 2017) (appeal pending).

²⁶ *Id.* at *4.

VoIP service, or if that service caused the call to be answerable on her mobile phone, then potential liability may attach for a caller's use of an ATDS without the consumer's prior express written consent. For this reason, the SMS Industry Participants urge the Commission to require reporting by VoIP service providers.

D. Comprehensiveness of Database Information – Universe of Numbers Reported

The SMS Industry Participants share the Commission's concern that a database containing every number that is allocated by a numbering administrator to a service provider would be unwieldy.²⁷ For this reason, the SMS Industry Participants believe that the database should only include numbers that have been disconnected since the commencement of the database.

E. Indirect Assignment

With regard to the Commission's questions surrounding the indirect assignment of telephone numbers,²⁸ the SMS Industry Participants submit that the Commission should impose the reporting requirement on the entity obtaining the numbers from the NANPA, consistent with current number utilization reporting requirements. However, the SMS Industry Participants also believe that the Commission should provide flexibility for the parties involved in those relationships, allowing them to contractually delegate the reporting requirements to the VoIP service providers using the phone numbers. In certain circumstances, particularly for larger VoIP service providers, it may be more efficient and less costly for the VoIP service provider to directly report when a number utilized on its service has been disconnected, rather than requiring that information to be passed to another entity for reporting. Thus, the SMS Industry Participants believe that the Commission should impose the reporting requirements on the entity

²⁷ See SFNPRM, ¶ 20.

²⁸ See *id.* ¶ 40.

obtaining the numbers, while allowing that duty to be delegated to a willing VoIP service provider.

F. Timeliness of Database Information Updates

The SMS Industry Participants believe that the frequency of updates should depend on the frequency with which a particular carrier reassigns numbers to new users. For example, carriers like AT&T and T-Mobile that put numbers back in service after only two days of aging should be required to provide daily reports on numbers that are disconnected. Daily reporting would ensure that the database aggregator and its customers would have time to process the disconnects before the number has been returned to service.

Many smaller wireless carriers, however, age numbers for a much longer period of time. For those carriers, the Commission should not require reporting to occur as frequently. Rather, for any carrier that ages numbers for at least 45 days, the Commission should allow reporting to occur on a monthly basis, rather than a daily basis. This would appropriately balance the needs of a database aggregator to ensure that the data is available in a timely fashion with the Commission's reasonable desire to avoid imposing undue burdens on smaller wireless carriers.

G. Format of Database Information

At a minimum, the SMS Industry Participants encourage the Commission to require wireless carriers to provide the data in a structured, consistent file type, such as a CSV or similar file type, which makes the information more easily accessible and useable without imposing any additional costs on the wireless carriers providing the data or the platform software provider processing the data.

The SMS Industry Participants also encourage the Commission to avoid imposing any rules that would prohibit aggregators from negotiating to obtain data from wireless carriers

through API or other automated processes. While it is unnecessary to impose an obligation on wireless carriers to provide an enhanced service, aggregators should be permitted to contract with wireless carriers to obtain services that may make the process of aggregating data more efficient and cost effective.

H. Database Use and TCPA Compliance

As the SMS Industry Participants noted in their introduction, the D.C. Circuit’s decision in *ACA International v. Federal Communications Commission* has made the Commission’s resolution of the reassigned numbers issue even more pertinent, as that decision removed the only safe harbor callers had when calling reassigned numbers. Thus, to fix the regulatory gaps created by the *ACA International* decision and to further reduce the potential for wasteful litigation, the SMS Industry Participants urge the Commission to propose and adopt a new, more comprehensive safe harbor for callers who use a comprehensive and accredited disconnected number resource.

With regard to the specifics of the safe harbor, while the Commission’s safe harbor for ported numbers²⁹ provides a useful model, it should not be applied without modification. More specifically, the text of that safe harbor indicates that it is limited to “voice calls.”³⁰ Any safe harbor created to address disconnected numbers should include SMS, MMS, and over-the-top (“OTT”) messaging, such as RCS messaging. Furthermore, the safe harbor contained in the Do-Not-Call (“DNC”) provision,³¹ while closer, is also not fully compatible, as it imposes training requirements and a requirement to maintain a company-specific DNC list, both of which have no application in the reassigned numbers context.

²⁹ See 47 C.F.R. § 64.1200(a)(1)(iv).

³⁰ *Id.*

³¹ See 47 C.F.R. § 64.1200(c)(2).

With this in mind, the SMS Industry Participants propose the following adapted version of the safe harbor for the Commission's consideration:

Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made), whether via voice call, SMS, MMS, or other technology, will not be liable for violating the requirements of 47 C.F.R. § 64.1200(a)(1)(iii) if:

(i) It can demonstrate that it has prior express consent to call the number, and that, as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to avoid making calls and/or sending messages to disconnected telephone numbers;

(B) Removing disconnected numbers based on data from a Commission-accredited aggregator. It uses a process to prevent telephone solicitations to any telephone number reported as having been recently disconnected by verifying, based on data obtained from a Commission-accredited reassigned number aggregator no more than 15 days prior to the date any call is made, that it has removed all numbers listed as recently disconnected, and maintains records documenting this process.

The SMS Industry Participants believe that this safe harbor includes the necessary elements to meet the Commission's objective of protecting consumers without imposing unnecessary burdens on wireless carriers, platform providers, or callers.

I. User Access to Database Information

1. CPNI and Eligibility to Access Database Information

The SMS Industry Participants believe the Commission should declare that the fact a person has discontinued using a telecommunications service is not protected by the Commission's CPNI rules. The CPNI rules are intended to protect a consumer's privacy, including information regarding the services that she subscribes to. However, there is no reason to believe that the consumer has an interest in protecting the fact that she *stopped* subscribing to whatever service she previously acquired. For this reason, the SMS Industry Participants do not

believe that it is necessary for the Commission to require aggregators to verify that they will only use disconnected number information for purposes of complying with the TCPA.

2. Tracking Access to Database Information

The SMS Industry Participants do not foresee a need for the Commission to impose specific rules requiring aggregators to track how information regarding reassigned numbers is accessed. To the extent the Commission creates a safe harbor, the safe harbor will impose an obligation on the party seeking its protections to prove that it cross-referenced the list of disconnected telephone numbers before sending the text message in question. This obligation will provide sufficient incentive for the database aggregator and/or caller to maintain records regarding who accesses the data and when. No further Commission rule appears necessary.

3. Cost to Use Database

The SMS Industry Participants submit that allowing accredited aggregators to assemble and sell access to disconnected numbering information on a commercial basis is the best way to avoid having costs undermine the ability of callers, including schools and other nonprofit organizations, to obtain the information. Because the SMS Industry Participants envision a competitive market, rather than a monopolistic market, they do not encourage the Commission to adopt rules restricting the ability of aggregators to adapt and respond to market conditions in real time and to provide discounts and incentives to attract and retain customers.

J. Cost Recovery for Covered Service Providers

As the SMS Industry Participants and several other commenters note, many voice providers are already making information regarding number disconnects available to aggregators. The Commission should not disturb the process by which the exchange of this information is being negotiated. To the extent that service providers are compensated for

providing reassigned number information, the Commission should implement a rule directing the compensation to be established pursuant to commercial contracts, with the caveat that all service providers be required to provide the information on a non-discriminatory basis to any FCC-accredited aggregator. By enacting such a rule, the Commission will retain the benefits of market-based competition while preventing larger carriers from extracting price premiums and/or refusing to provide the data except to a single entity (and thereby creating a *de facto* monopoly provider of reassigned number information).

CONCLUSION

The SMS Industry Participants appreciate the Commission's interest in finding a resolution to the reassigned numbers issue and encourage the Commission to act expeditiously. If the Commission moves forward with creating a reassigned numbers database, the SMS Industry Participants hope that the Commission will implement rules that are consistent with a competitive telecommunications landscape, rather than picking winners and losers by selecting a single database administrator. To the extent a database is created, the Commission's rules should include a safe harbor for companies that scrub their robocalling and text message contact lists using data provided by an FCC-accredited source.

Sincerely,



G. David Carter

John C. Nelson, Jr.

TCPA DEFENSE FORCE

By Innovista Law PLLC

1825 K Street, NW, Suite 508

Washington, D.C. 20006

(202) 869-1502

(202) 869-1503 (fax)

david.carter@innovistalaw.com

john.nelson@innovistalaw.com

*Counsel to Tatango, Inc., Adva
Mobile, Inc., Blue Heart Imports,
eDealColorado, and Mobiniti*